88-1224

NO._____

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

MICHAEL REED,

Petitioner,

v.

NORTHWESTERN PUBLISHING COMPANY, d/b/a THE COMMERCIAL NEWS, BOB WILSON and CARL YOUNG,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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I

QUESTION PRESENTED

Whether Petitioner, a patrolman for the Danville, Illinois Police Department, is a public official within the meaning of **New York Times Co.v. Sullivan**, thereby requiring Petitioner to prove actual malice to recover damages in a libel action.

II

PARTIES BELOW

Petitioner:

Michael Reed

Respondents:

Northwestern Publishing Company, d/b/a The Commercial News; Bob Wilson and Carl Young

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

---o---

MICHAEL REED petitions for a Writ of Certiorari to review the decision of the Supreme Court of Illinois in this case.

V

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 124 Ill.2d 495, 530 N. E. 2d 474, 125 Ill.Dec. 316 (1988)

JURISDICTION

The decision of the Supreme Court of Illinois was announced on October 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution
Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to

assemble, and to petition the government for a redress of grievances.

United States Constitution

Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

28 U.S.C. §1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

The Petitioner, Michael Reed, brought this action to recover damages for libel. A Summary Judgment Order was entered in favor of Respondents on June 29, 1983 which determined that Petitioner was a "public official" for the purpose of applying the test of **New York Times v. Sullivan.** (R. 397-406) The Appellate Court of Illinois affirmed the trial court on that issue but reversed the trial court on other matters. **Reed v. Northwestern Publishing, et al,** 129 Ill.App.3d 133, 471 N.E.2d 1071 (4th Dist, 1984). (R.436-455) The cause was remanded to the trial court for trial. At the close of all the evidence in that jury trial the Respondents moved for a directed verdict. The motion was granted as to Respondent Carl Young and denied as to the other two Respondents. (R.483)

The case was submitted to the jury on special interrogatories. The jury responded that, although the articles of Respondents

were false, the articles were not published with actual malice. The trial court thereupon entered a judgment for the Respondents on the verdict. (R.484) The Petitioner thereupon filed his post-trial motion raising again the issue of Petitioner's status of "public official" (R.486-505) which post-trial motion was denied. (R.522-523)

The Petitioner timely filed an appeal to the Fourth District Court of Appeal for the State of Illinois. The Fourth District affirmed the judgment of the trial court. **Reed v. Northwestern, et. al.**, 159 Ill.App.3d 699, 512 NE2d ;828 (4th Dist, 1987). (A.63). A petition for discretionary review was timely filed with the Supreme Court of Illinois and the petition was granted.

The Supreme Court of Illinois affirmed the decision of the Fourth District Court of Appeal holding that Petitioner was a public official, citing **New York Times v. Sullivan**, 376 U.S. 254 (1964). (A.1)

The earliest stage of the proceedings wherein the federal question of whether Petitioner was a public official was raised was in the trial court during the pleading stage and was argued in the first appeal. The same federal question was briefed and argued before the Fourth District Court of Appeal for the State of Illinois and also before the Supreme Court of Illinois which affirmed the decision of the trial court and the Fourth District Court of Appeal holding that Petitioner was a public official. (A.1.)

The Petitioner, Michael Reed, alleged in his Second Amended Complaint that he was libeled by the Respondents, Northwestern Publishing Company, publisher of *The Commercial News*, and two of its reporters, Bob Wilson and Carl Young. The Respondents had published that Petitioner was named in a Grand Jury Report as being a burglar and as being involved in a police burglary ring. The Respondents, Carl Young and Bob Wilson, were authors of

some of the allegedly defamatory articles printed concerning the Petitioner (Petitioner's Exhibits Nos. 5-11).

The Vermilion County Grand Jury, on September 1977 through May 1978, heard evidence involving criminal activities of the City of Danville police officers in 1970-1971. In the late afternoon on December 20, 1978, an eight-page document entitled "Grand Jury Report" was released to the public by the trial court. (Petitioner's Exhibit #1).

The following day (December 21, 1978), Respondent's newspaper, *The Commercial News* published two articles relating to the investigation and to the Grand Jury Report (Petitioner's Exhibit #5). The headline that day was:

"GRAND JURY DESCRIBES POLICE BURGLARY SETUP"

Immediately below the headline were pictures of Petitioner and five other persons.

The caption under the picture of Petitioner and two other officers was:

"CURRENT OFFICERS IMPLICATED IN REPORT"

==========

"FOUR CURRENT LAW OFFICERS-ARNOLD YANDERS, ROBERT TESTA, MICHAEL REED AND KENNETH COX WERE NAMED BY GRAND JURY WITNESSES AS JOINING IN AT LEAST ONE OR A FEW OF THE REPORTED BREAK-INS BY POLICEMEN. .."(Petitioner's Exhibit #5).

Adjacent to the pictures and below the headlines was an article authored by the Respondent, Bob Wilson. That article asserted *inter alia* that:

"(1) The Grand Jury investigation determined that up to ten police officers were involved in break-ins . . . . according to the report." (Column 1, Page 1: Petitioner's Exhibit #5).

"(2) The "usual practice" according to the Grand Jury testimony of a former policeman identified as one of the ring leaders was to split whatever was taken among the patrolmen on the scene." (Column 1, Page 1: Petitioner's Exhibit #5).

"(3) At least three (of the officers involved in the burglaries) remain on the department . . ." (Column 1, Page 1: Petitioner's Exhibit #5).

"(4) Massey, Roland and other witnesses at the Grand Jury sessions identified other officers involved, too.
They included former policemen Jerry Hill and Richard Moody and current officers Sgt. Robert Testa, Patrolman Arnold Yanders, Patrolman Mike Reed and former Patrolman Kenneth Cox, who is now a county deputy." (Column 1, Page 2: Petitioner's Exhibit #5).

"(5) Massey also was at Harding's break-in on August 25, 1971, he said, and saw Roland, Hill and Cox removing watches and electric shavers from a display after they responded to a supposed burglary call.

Lt. Edwin McGhee also testified about the Harding's incident, saying he came on the scene and found Hill, Roland, Massey and Officer Mike Reed inside but without their flashlights turned on.

McGhee, who headed the internal investigation at the time, said that when he entered the store no watches or shavers were missing from the display but that Hill's burglary report filed the next day listed them among the missing items." (Columns 2 and 3, Page 2: Petitioner's Exhibit #5).

The newspaper article did not state what the Grand Jury Report stated. The Report mentions Mike Reed's name twice, on Page 4 and on Page 6. On neither occasion is there an allegation in the Grand Jury Report of specific wrongdoing by Michael Reed. (Petitioner's Exhibit #1).

The Grand Jury Report does not support the assertions set forth as Items Nos. 1 through 5 above. These assertions are incorrect and false.

Thereafter on December 22, 1978, Respondent Wilson alleged in Respondents' newspaper that:

> "Four former policemen-Jack Roland, Richard Massey, Jerry Hill and Richard Moody-were named as participants in break-ins and thefts, as were three current city policemen-Arnold Yanders, Robert Testa and Michael Reed-and one who has since become a county sheriff's deputy, Kenneth Cox." (Column 1, Page 1, : Petitioner's Exhibit #6).

Respondent Wilson, in the articles authored by him on December 23, 1978, further

related the matters concerning the Grand Jury Report and accused Michael Reed as follows:

> "The Report . . . concluded there was enough evidence to show that at least eight officers directly participated in at least 14 break-ins at local stores, gas stations, the American Legion Post 210 and the Elks Country Club. Three officers still with the department-Robert Testa, Arnold Yanders, and Michael Reed-were named as participants in one or more incidents." (Columns 2 and 3, Page 1: Petitioner's Exhibit #7).

Thus, in each one of the newspapers of December 21, 22, and 23, 1978 Michael Reed was described in the articles and captions under his picture as being a burglar.

Each one of the accusations directed against Michael Reed was claimed to be based on the Grand Jury Report. The Grand Jury Report does not state that Michael Reed was a burglar. The Report states that "most of the officers named as being directly involved in the crimes of burglary and theft have left the Danville Police Department" but that "several officers

having direct knowledge of police misconduct and peripheral involvement therein are still employed as Danville Police Officers" (Petitioner's Exhibit #1). The Report mentions Reed only twice as stated above and never refers to him as joining in any break-ins.

In his testimony, Respondent Wilson stated that upon seeing and reading the first article (published on December 21, 1978), he felt uncomfortable "with the paper, picture and captions" (T. 77-78). Wilson testified that his feeling of discomfort related particularly to the caption under Reed's picture which stated that Reed was implicated or joined in at least one of a few reported break-ins (T. 79). Wilson did not inform anyone that he was concerned about Reed's involvement, did not change his article and continued to make the allegations that Reed was a burglar in his articles published on December 22 and December 23, 1978 in spite of his concern about the accuracy

of the characterization of Reed in the publication of December 21 (T. 81-82).

Prior to its receipt of the Grand Jury Report, the newspaper, its editor and and its city editor had knowledge of specific names of persons involved in the police burglary ring and had knowledge of specific occurrences of wrongdoing by policemen. On December 21, 1978 in Respondent's newspaper on Page 9 under the heading "Prosecutors: C-N Played Role In Investigation," it was stated:

> "Craig DeArmond, who helped present information to the Grand Jury, said specific names and occurrences supplied by C-N reporters more than a year ago helped provide a framework for prosecutors to present information to the grand jury." (Petitioner's Exhibit #5).

An article in *The Commercial News* on September 8, 1977 stated: " that as many as seven former or present Danville police officers may have been involved in committing burglaries" and further reported "sources said seven past and present police officers are

suspected of the burglaries. . . ." The Grand Jury Report implicates seven officers as being participants in the burglary ring. Randy Kirk, the editor of *The Commercial News,* stated that on December 21, 1978, prior to the paper's publication, he told his staff he thought the Grand Jury was reporting that six or seven officers were involved in the burglary ring (T. 177). In spite of this statement and in spite of the knowledge that the Respondents had prior to December 21, 1978 that only 7 officers had been implicated, it was reported by Respondents on December 21, 1978 in the first page of the paper that there were eight such officers, pictures of six of whom (including Petitioner) were prominently displayed on the front page on that date.

Prior to the publication of the offending articles, editor Randy Kirk knew of the investigation that had been made by his reporters. These reporters, Dan Olmstead and Les Smith, both knew that there were sources

which were naming names (T. 166-167). Through this period of time, Mike Reed's name was not named (T. 171-172), and the reporter (either Dan Olmstead or Les Smith) had a copy of the investigation that had been prepared by the source or by others in 1971 (T. 164-166). At the time of the publication on December 21, 1978 the editor stated that he was concerned with Mike Reed being named as a participant because "there was not enough detail what his involvement was as far as the Grand Jury was concerned" (T. 180). In spite of the knowledge and this concern he permitted the paper to be published. (T-171-181)

After the publications of December 21, 22, and 23, there were subsequent publications by Respondent, *The Commercial News*, authored by Respondent, Carl Young. The first such publication appeared on March 6, 1979 (Petitioner's Exhibit #8) and stated as follows:

"However, a City Hall source said those taking the lie detector tests 'presumably' will include three city officers who were alleged by the grand jury to have burglarized city stores." (Petitioner's Exhibit #8).

"The report said three of the officers were still on the Danville police force. . .." (Petitioner's Exhibit #8).

The next publication by Respondents and by Carl Young, in *The Commercial News* appeared on March 10, 1979 (Petitioner's Exhibit #9), and stated:

"A seven-page summary of the . . . grand jury testimony . . . named three current officers . . . as participants in at least one of the 1970-71 break-ins." (Column 3: Petitioner's Exhibit #9,).

On March 28, 1979, an article in *The Commercial News* authored by Carl Young again stated:

"The officers were ordered to take the tests as part of a city investigation of grand jury allegations that three current city officers were involved in a burglary ring within the department in 1970-71." (Column 1: Petitioner's Exhibit #10).

On March 29, 1979, the Respondent, *The Commercial News*, published another article authored by Respondent, Carl Young:

> "A grand jury report named three current city officers as participants in an alleged burglary ring that supposedly operated within the Danville Police Department in 1970-71.
>
> The city ordered seven city officers, including the three named in the grand jury report, to take lie detector tests based on testimony given to the Grand Jury." (Petitioner's Exhibit #11).

Carl Young admitted to having read the story on December 21, 1978 (T. 205). He had read the captions underneath the pictures of the current officers and had read the Report, but he did not make an analysis of what the articles said or what was in the report about Mike Reed either on that day or on the 22nd or 23rd of December (T. 205-211). The other articles authored by Carl Young occurred two to three months after these events.

The above mentioned evidence was presented to the jury. The day following the jury verdict the Respondent newspaper reported an interview with the jury foreman in which the jury foreman stated:

> "Our general feeling was that the C-N hurried its decision on writing an article on the grand jury report but by law the Petitioner did not prove that the reporter actually wanted to malign Mr. Reed."

A post-trial motion was filed by the Petitioner on July 24, 1986. The court denied the this motion on October 16, 1986. The Fourth District Appellate Court affirmed the trial court's decision on August 24, 1987. (A. 65). The Supreme Court of Illinois affirmed the decision of the appellate court and upheld the jury verdict. (A.1)

ARGUMENT

THE COURT SHOULD GRANT THIS WRIT OF CERTIORARI AND DETERMINE WHETHER A POLICEMAN OF THE LOWEST RANK IS A PUBLIC OFFICIAL FOR PURPOSES OF NEW YORK TIMES v. SULLIVAN.

In the 1964 decision of **New York Times Co. v. Sullivan**, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), this Court held that, in order to recover for libel, a "public official" who was criticized in his official conduct must show with convincing clarity that the Respondent .acted with actual malice. In so doing, the Court safeguarded against excessive self-censorship, thus eliminating the "pall of fear and timidity imposed upon those who would give voice to public criticism, an atmosphere in which First Amendment free-

doms cannot survive" (376 U.S. at 278). Excessive self-censorship is obviously harmful in a system of popular sovereignty. However, the Court undoubtedly realized that society also has a responsibility to protect an individual's reputation. Thus, the Court applied the stringent **New York Times** requirements only within the boundaries of "public officialdom."

The Court in **New York Times** did not define the term "public official," declined to answer in detail the question of how far down into the lower ranks of government employees the "public official" designation would extend for purposes of the rule, did not specify categories of persons who would or would not be included and did not determine the boundaries of the official conduct concept (376 U.S at 283 note 23).

An examination of the precedents relied upon by the Court in **New York Times** provides some guidance concerning the scope of the "public official" concept. None of the

decisions relied upon involved lower echelon public employees. The precedents relied upon in **New York Times** included only individuals with positions of substantial actual or potential influence in the political arena (candidates for public office, a United States Congressman, members of the judiciary, high ranking police and military officers and federal and state executive officials of significant policy making authority).

In the decades following **New York Times**, a number of decisions have hinged upon exactly "how far down into the lower ranks of government employees that 'public official' designation would extend" (376 U.S. at 283 note 23). It is submitted that a number of lower courts have misinterpreted both **New York Times** and subsequent Supreme Court rulings by placing the lower echelons of government employees under the rubric of "public officials." Specifically, it is submitted that Mr. Reed, serving as an ordinary beat police-

man, should not be subject to the stringent **New York Times** requirements.

In 1966, two years after **New York Times**, this Court in **Rosenblatt v. Baer**, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966) was confronted with the question of how far down into the lower ranks of government employees the public official designation would extend. In **Rosenblatt** the Court rejected the suggestion that reference to state law standards would be controlling, and the Court attempted to delineate general federal guidelines for determination of "public official" status, noting that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation" (383 U.S. at 86). A concurring Justice Stewart emphasized this point by stating:

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being---a concept at

> the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of a constitutional system" (383 U.S. at 92).

Although the Court recognized the need to protect an individual's reputation, it also acknowledged a "tension between this interest and the values nurtured by the First and Fourteenth Amendments" (383 U.S. at 86). Thus, the **Rosenblatt** Court attempted to set general guidelines for determining what types of government employees qualify as "public officials." With respect to the exact line of demarcation between the "public official" and the ordinary citizen, the Court stated:

> "It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the

conduct of governmental affairs" (383 U.S. at 85).

In addition, the Court stated:

> "Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in **New York Times** are present and the **New York Times** malice standards apply" (383 U.S. at 86).

The Court specifically rebutted the contention of concurring Justice Douglas that the key man in a government hierarchy might be a night watchman accused of taking state secrets and disregarded the notion advanced by Justice Douglas that such a lower echelon employee should be required to comply with the **New York Times** criteria.

The conclusion of **Rosenblatt** was that in applying the general criteria of **New York Times** "that Rosenblatt may have held such a position of public official" but the Court did not hold that he fell within the public official

classification. Rather the Court determined that it was a matter for the trial judge upon remand in the first instance to determine whether the proof showed that the Petitioner was a "public official". It is submitted that this is a burden for the Respondent to sustain and to show that the case is within the **New York Times** standard. If the Respondent sustains that burden of proving public official status and thus the privilege granted by **New York Times,** then the Petitioner has the burden of proving the privilege was abused. In the instant case there was no determination by the trial court in the first instance on the facts of this case that the Petitioner was a public official but it instead determined, as a matter of law, that the Petitioner was a public official. It is submitted that the Respondent in the instant case had the burden of proving the presence of the circumstances necessary to establish "public official" status and the existence of a privilege to publish the

defamatory communication. It was made clear in **Rosenblatt** that the question whether a person is a public official is to be determined not by state law standards but by standards announced by the U.S. Supreme Court. In the instant case it was incumbent on the trial court to find, by fact intensive analysis, that this Petitioner was a public official based on one of the alternative tests of **Rosenblatt.**

In 1974, the Supreme Court addressed the question of the extent to which **New York Times** can be applied to private individuals. In **Gertz v. Robert Welch, Inc.** 418 U.S. 323, 94 S. Ct . 2997, 41 L .Ed. 2d 789 (1974), the Court conceded that the **New York Times** standard "exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving Petitioners, including some intentionally subjected to injury, will be unable to surmount the barrier of the **New York Times** test"(418 U.S. at 342). This led the Court to reject the **Rosenbloom v. Metromedia, Inc.**,

403 U. S. 29, 29 L.Ed. 296, 91 S.Ct. 1811 (1971) plurality extension of **New York Times** to matters of "public or general interest." The Court delineated a distinctive difference between public and private persons:

> "The first remedy of any victim is self-help --- using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy" (**Gertz,** 418 U.S. at 344).

The Court concluded that "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery"(418 U.S. at 345).

The Illinois Supreme Court in the instant case affired its decision in **Coursey v. Greater Niles Township Publishing** Cor-

poration, 40 Ill. 2d 257, 239 N.E. 2d 837 (1968) wherein it was stated:

> "It is our opinion that the Petitioner is within the 'public official' classification. Although as a patrolman he is 'the lowest in rank of police officials' and would have slight voice in setting departmental policies, his duties are peculiarly governmental in character and highly charged with the public interest. It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers even at, and perhaps especially at, 'on the street' level than in the qualifications and conduct of other comparable low-ranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed toward the performance of that office cannot constitutionally be inhibited by threat of prosecution under state libel laws." (239 N.E. 2d at 841).

It is submitted that the course of treatment of the concept "public officials" by this Court would dictate that the "public official" definition for purposes of the constitutionally

prescribed standard of defamation would not apply to a patrolman as a matter of law. The concept of "public official" is not based on whether or not the public official is performing a "primary function of local government" as oposed to whether it is a "proprietary function," nor does the "great potentiality for social harm" fit within the standards announced in **Rosenblatt**. The question is: Does the official have substantial responsibility for or control over governmental affairs? The answer to that question in the instant case is "No".

In a 1979 decision this court again rejected the notion of an all encompassing "public official" status. **Hutchinson v. Proxmire,** 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed. 2d 411 (1979) cast doubt on how pervasively the term "public official" is to be construed. Hutchinson was Director of Research at the Kalamazoo State Mental Hospital, and was a state employee. He had also been an

adjunct professor at Western Michigan University. This Court noted:

> "The District Court also concluded that Hutchinson was a 'public official.' 431 F.2d at 1327-1328. The Court of Appeals did not decide whether that conclusion was correct. 579 F.2d 1027, 1035 N. 14 (C. A. 7, 1978). We therefore express no opinion on the issue. The court has not provided precise boundaries for the category of 'public official,' and cannot be thought to include all public employees, however." (443 U.S. at 119 note 8).

This Court thereby again explicitly rejected the notion that mere public employment is synonymous with public official status.

From **New York Times** up through **Hutchinson** this Court has refuted any suggestion that any and all government employees from the highest to the lowest echelons of governmental employment warrant treatment as "public officials". The severe incursions on a public employee's rights to redress for injury to his reputation should not apply to each and every public official. It is noteworthy that

this Court has, on three occasions, rejected the suggestion that the merest governmental connection suffices for "public official" status - its night watchman analysis in **Rosenblatt,** its rejection of an attorney-officer of the court as a public official in **Gertz** and its footnote 8 in **Hutchinson**. It is also noteworthy that the Supreme Court has not held anyone as low ranking as a policeman to be a public official. In **Time, Inc. v. Pape**, 401 U.S. 279, 91 S. Ct. 633, 28 L. Ed. 2d 45 (1971) the Court accepted, without deciding, the lower courts' determination that a deputy chief of detectives of the Chicago Police Department was a public official.

In **St. Amant v. Thompson**, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), only one member of the Court denominated the deputy sheriff as a "public official." The Court, however, adopted for "purposes of this case only" the Louisiana court's determination that a parish sheriff was a "public official."

Although this Court has repeatedly rejected the notion of an all-encompassing public officialdom, a number of lower courts have ignored or misinterpreted the aforementioned caveats of **Rosenblatt** and **Hutchinson**. A number of these courts have followed the rationale of **Coursey v. Greater Niles Township Publishing Corporation**, 40 Ill. 2d 257, 239 N.E. 2d 837 (1968) by extending "public official" status to the lower echelons of law enforcement officers. This Court has not yet placed "lower-level" employees under the rubric of "public officials." The course of treatment of the concept "public officials" by this Court would seem to dictate that the "public official" definition for purposes of the constitutionally prescribed standard of defamation would not apply to a patrolman. This Court has consistently rejected the notion that all government employees should be subjected to the stringent **New York Times** burdens. "'Footnote thirteen' of **Rosenblatt**

constitutes a pivotal element in this delicate balancing of the competing interests of reputation and free expression involved in the determination of status issues" (See Elder, **Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria**, 33 Buffalo Law Review 579, 667).

It is submitted that implicit in the reasoning of **New York Times Co. v. Sullivan** is the concept that the governed must have the unbridled freedom to question the governor, and that those who are influenced by the operation of government must be able to freely criticize those who control the conduct of government. The lowly patrolman (in this case a rookie patrolman at the time when the reported events took place) is far too remote from the decision making processes of government to justify exposing him to a privileged assault upon his or her reputation. Nor does the lowly patrolman have the ability or the resources or the forums from which to speak to contradict

the alleged libel. His position in that regard is not at all analogous to the governor of a state or a mayor of a city who have the forums from which to contradict the alleged libel and the ability to use those forums. In this case the Petitioner, by written police department regulation, was prohibited from speaking out on any issues involving the police department

It is submitted that the carefully balanced position taken in **Rosenblatt** must be read with the all encompassing view thereafter expressed in **Rosenblum v. Metromedia,** 403 U.S. 29, 29 L.Ed.2d 296, 91 S. Ct. 811 (1971), which was thereafter rejected in **Gertz. v. Robert Welch, Inc.**, 418 U.S.323, 41 L.Ed.2d 789, 94 S. Ct. 2997 (1974). This Court has given recognition to an equitable and fundamentally fair compromise between inherently competing and inconsistent interests. The first interest is to protect the First Amendment rights of those persons who oppose individuals with actual or potential power over

the conduct of governmental matters. Those individuals - "public officials" - who are in the position to influence the decision making processes relinquish appreciably their claim to protection of their basic interest in reputation. The other interest at stake is the interest in personal reputation. This Court seems to have granted approximate parity to the two interests, treating the interest in reputation as an equally compelling need which must not be subjected to substantial depreciation.

It is submitted that this Court should determine that there is a group of public employees who are "public officials" as a matter of law - such as all elected officials, high placed appointed officials, etc. There is also a group of public employees who should be declared not to be "public officials," such as the court house janitor, the 'night watchman, the jailer and a whole host of other lower echelon public employees - including the ordinary beat policeman. The analysis in **Gertz**

would more appropriately apply to the ordinary beat policeman than to the person who has substantial responsibility for the conduct of government affairs. There is also a group of public employees who should be tested in each individual case as to whether they are "public officials" as a matter of fact. There are no facts in the record that show the Petitioner had substantial responsibility for the conduct of government affairs or in any way held a position sufficient to meet the **New York Times** tests of a "public official."

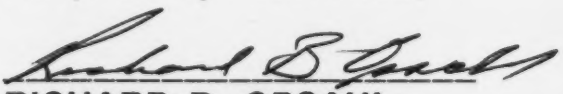
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CONCLUSION

For the reasons stated herein Petitioner submits that he, as a mere patrol officer, is not a public official as contemplated by this Court in **New York Times Co. v. Sullivan** and its progeny.

This Court should issue its Writ of Certiorari to the Supreme Court of Illinois to reverse that Court's judgment and remand the case for such further proceedings as may be consistent with this Court's ruling that Petitioner is not a public official within the meaning of **New York Times Co. v. Sullivan**.

Respectfully submitted,



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